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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 310

MARINE WELDING, SCALING & SALES CO., INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

versus

CAROLYN ANN ELLIS, EMELDA ELLIS, ELIZABETH ELLIS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ALFRED C. KAMMER,
Counsel for Petitioners.

ROSEN, KAMMER, HOPKINS, BURKE & LAPEYRE,
Of Counsel.

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versus

CAROLYN ANN ELLIS, EMELDA ELLIS, ELIZABETH ELLIS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Marine Welding, Scaling & Sales Co., Inc. and American Mutual Liability Insurance Company pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the case of *Carolyn Ann Ellis, et al. v. Joseph H. Henderson, Deputy Commissioner, et al.*, on May 1, 1953, rehearing denied June 17, 1953.

OPINIONS BELOW.

The award of the Deputy Commissioner (Appendix B.) is unreported. The District Court did not render an opinion. The opinion of the Court of Appeals (R. 84) has not yet been reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 1, 1953. (R. 92.) A petition for rehearing filed on May 20, 1953 (R. 93) was denied on June 17 1953. (R. 94.) On motion of petitioners herein the Court of Appeals stayed the execution and enforcement of the decree and the issuance of the mandate until the final disposition of this case by this Court. (R. 95.)

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the definition or interpretation of the word "child" under the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 901, et seq.) should be governed or influenced exclusively by State or local law.

2. Whether the Longshoremen's Act, which has a uniform application throughout the United States, should be deflected therefrom by State law or statute.

3. Whether the nine minor children of Albertha Ellis and Charles Joseph Southall are, by the provisions of the Longshoremen's Act, proper beneficiaries for the death of Edward Ellis, the deceased.

STATUTES INVOLVED.

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended; 33 U. S. C. 901, et seq.) and Civil Code of Louisiana (Article 184) are printed in Appendix A, *infra*.

STATEMENT.

On March 24, 1949, Edward Ellis, hereinafter referred to as the deceased, an employee of Marine Welding, Scaling & Sales Co., Inc., met his death by drowning. (R. 19.)

The deceased, when 19 years of age, and Albertha Washington, when 13 years of age, were, on November 16, 1923, married in the Parish Prison, at New Orleans, Louisiana. A charge had been made that deceased kept Albertha out all of one night and he was arrested and lodged in prison. At the time of this happening, the deceased was then living with one Elizabeth Jacobson. Immediately after the marriage, deceased was set free and returned to live with the Jacobson woman with whom

he lived until she died in 1939. After the death of the Jacobson woman, deceased took up with one Mathilda Phillips and lived with her as man and wife until his death. Deceased and Albertha Washington were never legally divorced.

After the death of the deceased, Albertha Ellis filed a claim for compensation (death benefits) under the Longshoremen's and Harbor Workers' Compensation Act with the Deputy Commissioner for the Seventh Compensation District, exclusively for herself, as widow of the deceased. After a hearing, the Deputy Commissioner, on May 1, 1950, issued a compensation order denying and rejecting her claim on the ground that for some fourteen years immediately preceding the death of the deceased, she had lived with another man, one Charles Joseph Southall, as husband and wife, and had borne nine children to him; that said action on her part was in derogation of her relationship as the lawful wife of the deceased and became the new and independent cause of her living apart from him at the time of his death. No judicial review of said compensation order was sought and it became final thirty days after it was issued. (R. 20.)

On October 3, 1951, more than two years after the death of the deceased, and more than one year after the denial of her individual claim, Albertha Ellis filed a claim with the Deputy Commissioner for and on behalf of the nine minor children, respondents herein, which she had borne to the said Charles Joseph Southall, for compensation (death benefits) as children of the deceased. (R. 20, 21.)

Marine Welding, Scaling & Sales Co., Inc., deceased's employer, and American Mutual Liability Insurance Company, its insurer, petitioners herein, denied said claim. (R. 23.) At the hearing before the Deputy Commissioner, it was admitted and stipulated by counsel for respondents, (R. 21), and also testified by Alebrtha Ellis, that about the middle of the year 1931, she began living with another man, one Charles Joseph Southall, as man and wife, and that they continued to live together, as man and wife, until sometime after the death of the deceased. It was also admitted and stipulated by counsel for respondents and also testified by Albetha Ellis that during the time she was living with the said Charles Joseph Southall, as man and wife, she gave birth to the nine respondents by said Southall. (R. 21, et seq.)

The sole question involved before the Deputy Commissioner was whether the nine minor children of Albertha Ellis and Charles Joseph Southall were entitled as "children of the deceased" to compensation (death benefits) under the provisions of the Longshoremen's Act.

On May 9, 1952, the Deputy Commissioner entered a compensation order (Appendix B.) in which he rejected the claim of respondents for compensation on the ground that "not anyone of the said nine children * * * is a child, or children of the deceased, Edward Ellis, but are children of Charles Joseph Southall born to Albertha W. Ellis by him, and none (no one) of the said children is entitled to compensation (death benefits) under the provisions of the said Act for the death of the decedent, Edward Ellis."

Respondents then filed their bill of complaint in the United States District Court for the Eastern District of Louisiana, New Orleans Division, (R. 1), contending that respondents were the legitimate children of deceased; that according to Louisiana law and jurisprudence they were conclusively presumed to be children of deceased; and praying that the aforesaid compensation order be set aside. To said bill of complaint, petitioners, together with the Deputy Commissioner, filed their motion to dismiss. (R. 5.) The motion came on for hearing in the District Court and after argument by counsel for all parties, was granted and respondents' action dismissed. (R. 80.) Respondents appealed to the United States Court of Appeals for the Fifth Circuit from the said decree of the District Court. (R. 80.) The Court of Appeals (R. 84) reversed the order of the Deputy Commissioner and the decree of the District Court, holding for respondent children solely by reason of the presumption under the law of Louisiana that the children of the mother are conclusively presumed to be the children of the husband of the mother, notwithstanding the stipulated and admitted fact that they were actually the children of Charles Joseph Southall and not of the deceased. There was a concurring opinion by Circuit Judge Strum in which he said: "I concur herein only because I am bound by the law of Louisiana, as it is correctly stated in the majority opinion." (R. 92.)

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred

1. In holding, irrespective of actual fact, admission and stipulation, that the meaning or interpretation of the word "child" in the Longshoremen's Act should be governed exclusively by the presumption of legitimacy under the State law.

2. In failing to hold that the Longshoremen's and Harbor Workers' Compensation Act, being a Federal statute, should be interpreted so as to give a nationwide uniform application thereto.

3. In failing to hold that the presumption under the State law that the children involved herein are the legitimate children of the deceased may be rebutted and that such presumption of the State law was clearly and indisputably rebutted herein.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals for the Fifth Circuit is in conflict in principle with the decisions of the Courts of Appeals for the Ninth, Fourth, Second and Eighth Circuits in *Weyerhaeuser Timber Co. v. Marshall*, 102 F. 2d 78; *Baltimore & O. R. Co. v. Clark*, 59 F. 2d 595; *Lembcke v. United States*, 181 F. 2d 703; and *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F. 2d 819; and with the decisions of the same Fifth Circuit in *Jacobs v. United*

States, 112 F. 2d 51, and *United States v. Robinson,* 40 F. 2d 14. The Court of Appeals for the Fifth Circuit in deciding that the determination of who is a "child" under the Longshoremen's and Harbor Workers' Compensation Act is also the decision of a Federal question in a way probably in conflict in principle with decisions of this Court. *C. M. & St. P. Ry. v. Coogan,* 271 U. S. 472; *Chesapeake & Ohio Ry. Co. v. Kuhn,* 284 U. S. 44; *Lindgren v. United States,* 281 U. S. 38; *Lyeth v. Hoey,* 305 U. S. 188.

In *Weyerhaeuser Timber Co. v. Marshall,* 102 F. 2d 78, the Court of Appeals for the Ninth Circuit said that they did not believe that their determination of who is a "child" so as to be entitled to compensation under the Act was to be influenced by provisions of State laws.

In *Baltimore & O. R. Co. v. Clark,* 59 F. 2d 595, the Court of Appeals for the Fourth Circuit thought it clear that they were not bound by the Maryland decisions; and, in deciding whether or not an injury was compensable under the Longshoremen's Act, they were interpreting a Federal statute which has a uniform operation throughout the United States and which "neither is nor can be deflected therefrom by local statutes or local views of common law rules." Citing *Lindgren v. United States,* 281 U. S. 38; *Panama R. Co. v. Johnson,* 264 U. S. 375; *Second Employers' Liability Cases,* 223 U. S. 1.

In *Lembcke v. United States,* 181 F. 2d 703, the question for decision was the meaning of the word "widow" as used in the National Service Life Insurance Act of 1940.

The Court of Appeals for the Second Circuit held that the "interpretation of words used in a Federal statute is a Federal question, not to be determined by local law, unless the statute is construed to intend the meaning to depend upon applicable state law."

In *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F. 2d 819, the Court of Appeals for the Ninth Circuit said that "Ever since the enactment of the Federal Employers' Liability Act, the courts have held that questions arising under it must be determined by Federal, not by State law."

In *Jacobs v. United States*, 112 F. 2d 51, wherein there was involved the definition of the term "child" under the World War Veterans' Act, the Court of Appeals for the Fifth Circuit refused to be bound by the judgment of a state district court.

In *United States v. Robinson*, 40 F. 2d 14, the Court of Appeals for the Fifth Circuit had for determination whether or not a putative wife under Louisiana law was a "spouse" within the selected class of beneficiaries under the War Risk Insurance Act. The Court said that "It would impair the uniform operation of the act throughout the country to permit a putative wife to be designated in Louisiana and rejected elsewhere."

This Court has held that questions arising under the Federal Employers' Liability Act must be determined by Federal, not by State law. See *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472; *Chesapeake & Ohio Ry. Co. v.*

Kuhn, 284 U. S. 44; and *Lindgren v. United States*, 281 U. S. 38.

2. The Longshoremen's Act should have a uniform application in all of the forty-eight states of the Union, and the force and effect thereof should not be left to the laws of the various states. In *Lyeth v. Hoey*, 305 U. S. 188, this Court said:

> "In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation.' Burnet v. Harmel, 287 U. S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon the state law. Burnet v. Harmel, supra."

Paragraph (14) of Section 2 of the Longshoremen's Act refers to the word "child" in the following language:

> "'Child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of the injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. * * *"

Neither of these children was a "posthumous child"; neither of these children was a "child legally adopted" prior to the death of the deceased; neither of these children was a child in relation to whom the deceased stood in *"loco parentis"*; and neither of these children was a "stepchild or an acknowledged illegitimate child dependent upon the deceased." None of these children being included in Paragraph (14) of Section 2 and the word "child" itself not being otherwise defined in said Paragraph, we look to other portions of the Statute to find, if we can, what kind of a child or children was intended by the Congress to be the beneficiary or beneficiaries thereunder.

Subparagraphs (1), (2) and (4) of Paragraph (d) of Section 8, and Paragraphs (b) and (c) of Section 9 (see Appendix A.) of the Act provide for payment of compensation to a "child of the deceased" and "child or children of the deceased."

Under the foregoing Sections of the Statute, it is a "child or children of the deceased" employee who would be entitled to the death benefit. The phrases "child of the deceased" and "child or children of the deceased" appear nine times in the portions of the Statute above referred to. By the number of times these phrases are repeated, the Congress, in enacting the Statute, undoubtedly intended that the only child or children entitled to the death benefit, other than those enumerated in Paragraph (14) of Section 2 of the Statute to be included in addition to a "child", should be a child or children of the deceased and no others.

The decision of the Court of Appeals that these nine children are entitled to the death benefits brings within the Act children whom we do not believe Congress intended to include. The purpose of the Act was to provide death benefits for children who were, in fact, children of a deceased workman and who had been dependent upon him for subsistence so that they would not become public charges. By such decision, we can visualize a situation where these children could receive the death benefits twice under the same Statute. For instance, if Edward Ellis, the deceased, and Charles Joseph Southall, their actual father who stood to them in relation of *loco parentis*, had been working together, side by side, and accidentally met their deaths simultaneously, these children could have claimed and would have been entitled to death benefits by reason of the deaths of each one of these men. This certainly was never the intention of the Congress in enacting this Statute.

It was beyond all reason for the Court of Appeals to hold that these nine children, all of them admitted and stipulated by their counsel and by their mother to be her children by Charles Joseph Southall, and all of them born to her by him while they were living together as man and wife for approximately twenty years, were the children of the deceased employee, Edward Ellis, merely because, under Louisiana law, the deceased was persumed to be their father.

3. The presumption under the State law that the children involved herein are the legitimate children

of the deceased was clearly and indisputably rebutted herein. At the hearing before the Commissioner, certain facts were agreed to by counsel for both parties for incorporation into the record. (R. 20, 21.) Included was the fact that Albertha Ellis, about the middle of 1931, began living with another man, Charles Joseph Southall, as his wife; that they continued to live together as husband and wife from that time until after the death of the deceased, and that she bore nine children to the said Charles Joseph Southall while thus living with him as his wife. (R. 21.)

There were also received in evidence on behalf of petitioners (as their Exhibits J to R, (R. 46)), copies of the original birth certificates filed within one week of the respective births showing the surname of respondents as "Southall" and their father as "Charles Joseph Southall", "Charles J. Southall" or "Charles Southall". Although the State law presumes that children born during marriage are legitimate (assuming such presumption would be applicable in determining under a Federal Act who is a child of a deceased employee) "it is well settled that the presumption of legitimacy of a child born during wedlock is rebuttable." See Annotations 128 ALR 713, et seq., Amer. Juris., Vol. 7, Bastards, Section 43, and Cumulative Supplement to Vol. 7, page 78.

CONCLUSION.

The decision below presents an important question of Federal law which this Court has not decided. The question whether or not the meaning, definition or interpretation of the word "child" in the Longshoremen's and Harbor Workers' Compensation Act is to be governed exclusively by State law is of such paramount importance to all employers, employees, and insurance companies governed by the said Act, as to call for an exercise of this Court's power of supervisicn over this cause. It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED C. KAMMER,
Counsel for Petitioners.

ROSEN, KAMMER, HOPKINS, BURKE & LAPEYRE,
Of Counsel.

APPENDIX A.

The Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U. S. C. A. 901, et seq., provides, in part:

Section 2. Definitions.

When used in this Chapter—

Paragraph (14):

> "'Child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of the injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. * * *"

Section 8.

Subparagraph (1) of Paragraph (d):

> "If there be a surviving wife or dependent husband and no child of the deceased * * *."

Subparagraph (2) of Paragraph (d):

> "If there be a surviving wife or dependent husband and surviving child or children of the deceased * * *."

Subparagraph (4) of Paragraph (d):

> "If there be a surviving child or children of the deceased * * *."

Section 9.

Paragraph (b):

"If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage, and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each such child in case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one. * * *"

Paragraph (c):

"If there be one surviving child of the deceased, but no surviving wife or dependent husband, then for the support of such child 35 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 35 per centum of such wages increased by 15 per centum of such wages for each child in excess of one."

Civil Code of Louisiana.

Article 184. "The law considers the husband of the mother as the father of all children conceived during the marriage."

APPENDIX B.

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Seventh Compensation District

Case No. 347-150

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

CHARLES JOSEPH ELLIS, GLORIA ELLIS, HERMAN ELLIS, ROSEMARY ELLIS, LORRAINE ELLIS, NATHANIEL ELLIS, ELIZABETH ELLIS, EMELDA ELLIS, CAROLYN ELLIS, (Minor Children) Claimants, (Edward Ellis, deceased employee)

against

MARINE WELDING, SCALING & SALES CO., INC., Employer

AMERICAN MUTUAL LIABILITY INSURANCE CO., Insurance Carrier

COMPENSATION ORDER

REJECTION OF CLAIM FOR COMPENSATION (DEATH BENEFITS)

Such investigation in respect to the above entitled claim having been made as is considered necessary and

A hearing having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT:

1. That on the 24th day of March, 1949, Edward Ellis, hereinafter called the decedent, was in the employ of the employer above named, at New Orelans, in the State of Louisiana, in the Seventh Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by American Mutual Liability Insurance Company; that on said day the decedent herein, while performing service for the employer upon the navigable waters of the United States, sustained accidental injury arising out of and in the course of his employment, and resulting in his disability and death while he was employed as a laborer on the S/S "W. L. Hershey", said vessel being then afloat in the Mississippi River at Charbonnet Street Wharf, at the Port of New Orleans, in the State of Louisiana, when, while on a scaffold suspended by rope from starboard side of said vessel, he fell from the scaffold into the waters of said river, resulting in his death by drowning;

2. That the death of the decedent occurred on March 24, 1949, as a result of said injury;

3. That written notice of said injury and death was not given within thirty days, but that the employer had immediate knowledge of said injury and death within said period and that the employer has not been prejudiced by such failure to give such written notice;

4. That no medical treatment was required for the decedent, as he was dead when his body was recovered from the river;

5. That the average weekly wage of the decedent, at the time of his injury and death, amounted to the sum of $46.80 per week; that full wages were paid for March 24, 1949;

6. That Albertha W. Ellis (nee Albertha Washington), now residing at 1718 Marais Street, New Orleans, Louisiana, was married to the decedent on November 16, 1923, and following their separation, about the middle of 1931, begin to live with another man, one Charles Joseph Southall, as his wife, and she and the said Charles Joseph Southall continued to live, and cohabit, together as husband and wife from about the middle of 1931 until after the death of the decedent, a period of some 17 years, during which time she gave birth to nine children by the said Charles Joseph Southall; that the names of said children were registered and recorded, within a week after each birth, with the City of New Orleans Health Department, as Charles Joseph Southall, Gloria Southall, Herman Southall, Rosemary Southall, Lorraine Southall, Nathaniel Southall, Elizabeth Southall, Emelda Southall and Carolyn Southall, that Albertha W. Ellis never obtained a divorce from the decedent, and the decedent did not

obtain a divorce from her; that each of the said nine children were borne in adultery; that following a judgment issued out of Division "C" of the Civil District Court, Parish of Orleans, State of Louisiana, on November 2, 1951, the last name (surname) of each of said children as appeared on the original birth registration certificates was changed from "Southall" to "Ellis", and the father's name of each of said children as appeared on the original birth registration certificates was also changed from "Southall" to "Ellis"; that the last name (surname) of each of said children was, therefore listed on their claim for compensation (death benefits) as "Ellis" instead of "Southall";

7. That Charles Joseph Ellis, one of the claimants listed above, residing with his mother, Mrs. Albertha W. Ellis at her address shown above, was born May 13, 1932; that Gloria Ellis, one of the claimants listed above, residing with her mother, Mrs. Albertha W. Ellis at her address shown above, was born May 25, 1934; that Herman Ellis, one of the claimants listed above, residing with his mother, Mrs. Albertha W. Ellis at her address shown above, was born May 12, 1938; that Rosemary Ellis, one of the claimants listed above, residing with her mother, Mrs. Albertha W. Ellis, at her address shown above, was born October 25, 1940; that Lorraine Ellis, one of the claimants listed above residing with her mother, Mrs. Albertha W. Ellis at her address shown above, was born July 17, 1942; that Nathaniel Ellis, one of the claimants listed above, residing with his mother, Mrs. Albertha W. Ellis at her address shown above, was born May 7, 1945; that Elizabeth Ellis, one of the claimants listed above

residing with her mother, Mrs. Albertha W. Ellis at her address shown above was born September 3, 1946; that Emelda Ellis, one of the claimants listed above, residing with her mother, Mrs. Albetha W. Ellis at her address shown above, was born December 23, 1947; that Carolyn (Carolyn Ann) Ellis, one of the claimants listed above, residing with her mother, Mrs. Albertha W. Ellis, at her address shown above, was born December 29, 1948; that not any one of the said nine children named above is a child, or children, of the deceased, Edward Ellis, but are children of Charles Joseph Southall born to Albertha W. Ellis by him, and none (no one) of the said children is entitled to compensation (death benefits) under the provisions of the said Act for the death of the decedent, Edward Ellis.

8. That the employer and insurance carrier herein have paid nothing as compensation (death benefits) to or on behalf of either of the claimants herein.

Upon the foregoing findings of fact it is the order of the Deputy Commissioner that the claim for compensation (death benefits) of each and all of the nine minor children named above be and they are, separately and collectively, hereby DENIED and REJECTED for the reasons set forth in Finding of Fact Number 7 hereinabove set forth.

Given under my hand at New Orleans, Louisiana, this 9th day of May, 1952.

(S.) JOS. H. HENDERSON,
Deputy Commissioner, Seventh
Compensation District.

JHH/d.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 310

MARINE WELDING, SCALING & SALES CO., INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,

Petitioners,

versus

CAROLYN ANN ELLIS, SHELDA ELLIS, ELIZABETH ELLIS, ET AL.,

Respondents.

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that the petition for the writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 1, 1953, in the case of Carolyn Ann Ellis, et al., versus Joseph H. Henderson, Deputy Commissioner, et al., be denied.

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STATEMENT OF FACTS

The nine respondents all minor children filed a claim for death benefits under the Longshoremen and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A., Sec. 901, et seq., as the legitimate children of their deceased father Edward Ellis. The Deputy Commissioner for the Seventh Compensation District concluded that the mother of the minor respondents and Edward Ellis, deceased employee, were legally married at the time of his death, that the nine respondents were born during the existence of marriage between their mother and the deceased employee, but concluded notwithstanding the substantive law of the State of Louisiana, that the nine respondents were born in adultery. The United States District Court for the Eastern District of Louisiana sustained the ruling of the Deputy Commissioner. Hence, the appeal followed to the Court of Appeals for the Fifth Circuit to set aside the conclusion of the Deputy Commissioner and the ruling of the District Court as not in accordance with law, and founded on an error of law. The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and the conclusion of the Deputy Commissioner. The petitioners herein then filed petition requesting a writ of certiorari to the Court of Appeals for the Fifth Circuit.

QUESTION INVOLVED

Where statutory law declares children to be the legitimate issues of a marriage forbidding even the husband and wife from denying this fact, may the Commissioner, under the Longshoremen and Harbor Workers' Compensation Act, disregard such final declarations and refuse to recognize these same children as "children" of said marriage, when the language of the Longshoremen and Harbor Workers' Compensation Act does not define the term "child".

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STATUTES INVOLVED

The pertinent provision of the Longshoremen and Harbor Workers' Compensation Act, supra, Section 2 of the Act (33 U.S.C.A., Sec. 902, par. 14) on definitions provides as follows:

> "(14) 'Child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. * * *"

The Civil Code of Louisiana, Articles 184, 185, and 191, which provide as follows:

Article 184 provides:

> "The law considers the husband of the mother as the father of all children conceived during the marriage."

Article 185 provides:

> "The husband can not by alleging his natural impotence, disown the child; he can not disown it even for cause of adultery, unless its birth has been concealed from him, in which case he will be permitted to prove that he is not its father."

* * * * *

Article 191 provides:

> "In all the cases above enumerated, where the presumption of paternity ceases, the father, if he intends to disclaim the legitimacy of the child, must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child." /Underscoring added/

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REASONS WHY THE WRIT SHOULD BE DENIED

The judgment rendered by the Honorable Court of Appeals for the Fifth Circuit found that the word "child" is not defined in the Longshoremen and Harbor Workers' Compensation Act, supra; that the word "child" when employed in a statute to designate relationship with father, means a "legitimate child", and, hence, concluded that the nine respondents herein were the legitimate children of their deceased father in accordance with the provisions of the statutory laws of the State of Louisiana on legitimate children and in complete accord with the decisions of the Supreme Court of the State of Louisiana.

The Honorable Court of Appeals for the Fifth Circuit followed the well settled decision of the United States Supreme Court in the case of Seaboard Airline Railway Co. v. Kenny, 240 U.S. 489, 494; 60 L.ed 765, 768, which can be best explained by quoting from Chief Justice White's decision:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But, as speaking generally under our dual system of government, who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would [761. 1027] seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But, it is urged, as next of kin was a term well known at common law, it is to be presumed that the words were used as having their common-law significance, and therefore as excluding all persons not included in the term under the common law; meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining when the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary. The truth of this view will be made

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> at once additionally apparent by considering the far-reaching consequence of the proposition, since, if it be well founded, it would apply equally to the other requirements of the statute,—to the provisions as to the surviving widow, the husband and children, and to the parents, thus, for the purposes of the enforcement of the act, overthrowing the legislation of the states on subjects of the most intimate domestic character, and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended, since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all the [Tol. 1037 states, after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others." Seaboard Airline Railway Co. v. Kenny, supra.

Since that decision it has been settled that "next of kin" is determined by state law. Poff v. Pennsylvania R. Co., 327 U. S. 399, 401. Following the same line of reasoning, it has been held that state law controls as to whether one was a widow so as to be entitled to compensation under the present Act. Keyway Stevedoring Co. v. Clark, 43 F.2d 983; Green v. Crowell, 69 F.2d 782; Belin v. Marshall, 76 F.2d 688; Turnbull v. Cyr, 188 F.2d 455 (1951). See also, Hutheson Imp. Co. v. Caldwell, 152 U.S. 65, 14 Sup. Ct. 504; Great Northern Railroad Company v. Knapp, 240 U. S. 464, 36 Sup. Ct. 399; Blagg v. Black, 162 U. S. 439, 16 Sup. Ct. 853.

In the definition of the Act, Congress enumerated the classes of persons under "child" that were eligible for the benefits of compensation, but did not in any language define the term "child". Thus, the intention of Congress was to set up the classes of persons entitled to the benefit and leave the determination as to what persons fit within the particular class to the local law on the subject.

The word "child" employed in a document of legal significance and especially in a statute, to designate relationship with a father referred to a legitimate offspring, See, C.J.S., Vol. 14, "child", pp. 1106-1110; Words and Phrases, Vol. 7, p. 4, et seq.; Bouvier's Law Dictionary; Ballantine's Law Dictionary, and Webster's New International Dictionary, 2nd Ed. (1951).

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The terms of the Act extend the status of "child" to include the classes of persons named in paragraph 14 of Sec. 2 of the Act (33 U.S.C.A. 902 /(14)), but otherwise Congress' definition of "child" in the Act is not complete. For example, it is left undetermined by the Act whether or not the progeny of a common law marriage, recognized as legal in some states and not in others, are the legitimate children of the father. In the case of Turnbull v. Cyr, supra, for the Ninth Circuit, it was decided that the marriage in question was valid and the Court concluded that since claimant was found to be the wife of the employee at the date of the birth of the "child", then the "child" was legitimate and there existed no question as to the "child's" dependency.

The pertinent law of Louisiana which controls the legal status of children is simplified by a very recent opinion of the Supreme Court of Louisiana, Fennel v. Fennel, 62 So. 2nd 119, 120, 121, in which that Court has restated the law with sufficient fullness:

> "Under Article 184 of the LSA-Civil Code, the law considers the husband of the mother as the father of all children conceived during the marriage, and it has been said in the jurisprudence of this court that the presumption created by this article is the strongest presumption known in law. In Dejol v. Johnson, Administrator, 12 La. Ann. 858, it was said that this legal presumption 'can only be rebutted in the mode and within the time prescribed by law. "The right to disavow and repudiate a child born under protection of the legal presumption is peculiar to the father and can be exercised only by him, or his heirs, within a given time, and in certain cases. * * *"' The strength of /Vol. 1047 this presumption was recognized by the court in the cited case by quoting with approval from Tate vs. Penne, 7 Mart. (N.S.) 548, that '"a child born during marriage cannot have its condition affected by the declaration of one or both of the spouses."'
>
> "According to Article 189, this presumption may be rebutted when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible.
>
> "In Tate v. Penne, supra, this court said:
>
> '* * The legal presumption of the husband being the father, and of access being presumed in cases of voluntary separation, can only be

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> destroyed by evidence bringing the parties within the exception the law has created to the rule, namely the physical impossibility of cohabitation-moral will not do.
>
> 'Now that physical impossibility can only be shown, by proving the residence of the husband and wife to be so remote from each other that access was impossible. . . .'"

Petitioners cite several cases in the brief submitted in request for the writ to sustain their argument that the decision of the Court of Appeals for the Fifth Circuit is in conflict with the decisions of the Courts of Appeals for other circuits. The cases cited are not pertinent to the subject matter and the issues involved therein can be properly distinguished from the issue now before this Court.

> Weyerhaeuser Timber Co. v. Marshall cited by petitioners deals with the expression "acknowledged illegitimate child" and it was found that such language should not be influenced by state statute requiring the acknowledgment in writing.

That decision is not analogous to the issue before this Court because that class of person as found in the Act was complete.

> Baltimore and O. R. Co. v. Clark cited by petitioners deals with the question of whether the injury which occurred was an injury within the meaning of the Act, and the Act itself clearly provided that the term injury means accidental or death arising out of and in the course of employment.

This case clearly does not have at issue the problem of determining domestic relationships of the claimant as the case now before this Court.

> In the case of Lembcke v. United States cited by petitioners, this case deals with the meaning of the word "widow" as used in the National Service Insurance Act of 1940.

The only issue involved in this case was whether a New York statute or a Pennsylvania statute should be used in determining the validity of the marriage.

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Graham v. Atchison T. & S. Railroad Co., cited by petitioners, had at issue the question of the validity of a written release entered into by an employee entitled to the benefit of the Federal Employers' Liability Act.

Jacobs v. United States, cited by petitioners, deals with the question under the War Risk Insurance Act. The Act stated that an illegitimate child could receive benefits only if it was acknowledged in writing or if the father was ordered judicially to support the child.

The only issue before the Court in that case was whether the father had acknowledged his child in accordance with the Act, and the facts clearly indicated that the child had not been acknowledged in writing or judicially. Hence, again the issue before that Court is not analogous to the issue now before this Court.

United States v. Robinson, cited by petitioners deals with the question of whether a putative wife under Louisiana Law was a "spouse" under the War Risk Insurance Act.

The issue in that case was not analogous to the issue before this Court since the Civil Code of Louisiana does not make a putative wife a legal wife of the bigamist, but merely grants her certain legal rights of a legal wife.

The Chesapeake & Ohio Ry. Co. v. Kuhn, cited by petitioners, merely had at issue the question of whether the Court should commit the defense of assumption of risk where an injured workman was injured through his own negligence.

Lindgren v. United States, cited by petitioners, deals only with the question of unseaworthiness of a vessel.

The cases above, cited by petitioners, do not genuinely indicate that there is any conflict between the decision of the Court of Appeals for the Fifth Circuit and any of those decisions. Whereas, the cases cited by the Court of Appeals for the Fifth Circuit in arriving at its decision clearly show that it acted in accordance with well settled decisions of the United States Supreme Court and of other Circuit Courts of Appeals.

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To follow petitioners' argument, it would have to be concluded that the Commissioner of each compensation district would be permitted to apply his own private rule in determining whether a claimant was a legitimate "child" of a deceased employee. That such conclusion would only render capricious and arbitrary determination all against the best interest of minor children who are unable to defend their legitimacy as against statements of illegitimacy and of improbable biological factors. The realm of domestic relationship has always been granted to the individual states wherein such issues of domestic relationship arises. Any other conclusion would surely disrupt the statutory relationships of the individual states in domestic matters and would cause no end of confusion. The petitioners would have this Court believe that a woman who cohabits with more than one party could place the stigma of illegitimacy on a child born to her by her statement that it was the child of one rather than the other. The statutory law should cast this deciding vote. The argument of petitioners would only lead us to the conclusion that a "child" in the instance of property rights could be considered legitimate under the statutory laws of the state, but illegitimate insofar as the compensation statute is concerned merely on the argument that it is a biological issue. For example, if these same nine respondents had sued under the Jones Act, their legitimacy could not have been disputed if in accordance with statutory law of the State Louisiana.

The statute in question does not contain a definition of "child" to whom the right of recovery is granted, and under our dual system of government, who is a "legal child" is determined by the legislation of the various states to whose authority that subject is normally committed. Certainly, Congress could not have intended, by the mere statement of a class, that is, "child", without defining the term, to overthrow the local laws of the state, and substitute another law for it. The argument of petitioners that Congress must have

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intended the term "child" should be uniformly applied in all the states, comes to saying that it must be assumed that Congress intended to create uniformity on one subject by producing discord and want of uniformity as to others.

Keeping in mind that the laws of the domicile of the father at the time he acts determine the effects of his act, and if such acts are such as to effectuate legitimacy as declared by those laws, the status of the child is thereby indelibly fixed. Pfeifer v. Wright, 41 F.2d 464; Patterson v. Gaines, 47 U.S. 550, 12 L.ed 553.

CONCLUSION

Petitioners seek the jurisdiction of this Court by way of this writ so that they may have another hearing of the factual issues involved herein, and seek a review of the evidence and inferences drawn from it. The decisions cited in petitioners' brief do not show a conflict with the issue now before this Court. Whereas, the decision rendered by the Court of Appeals for the Fifth Circuit was decided in complete accord with the decisions rendered by the Supreme Court of the United States in Seaboard Airline v. Kenny, supra, Poff v. Pennsylvania R. Co., supra, and in complete accord with the decisions rendered by the other Courts of Appeals of other circuits; Keyway Stevedoring Co. v. Clark, supra; Green v. Crowell, supra; Bolin v. Marshall, supra; Turnbull v. Cyr, supra; Delta Stevedoring Co. v. Henderson, 188 F.2d 872.

It is respectfully submitted that the request for the writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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I certify that a copy of this brief has been served on counsel for petitioners.

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